NO. 89-1710

In the Supreme Court of the United States

OCTOBER TERM, 1990

IRON WORKERS MID-SOUTH PENSION FUND, LOUISIANA LABORERS HEALTH & WELFARE FUND AND LABORERS NATIONAL PENSION FUND
Petitioners,

v.

BORDEN CHEMICAL, A DIVISION OF BORDEN, INC.,
Respondent.

Sub nom: Iron Workers Mid-South Pension Fund, et al v. Terotechnology Corporation, et al

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fifth Circuit's decision that the Louisiana Private Works Act lien procedures are preempted by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001 et seq. presents the following questions:

(1) Whether ERISA preempts La. R.S. 9:4803(A) insofar as it makes express reference to ERISA employee benefit plans and provides an independant cause of action to said plans and their trustees against property owners, who are not obligated to make contributions under ERISA, to recover delinquent contributions owed by signatory contractors.

(2) Whether the Fifth Circuit's decision conflicts with this Court's decision in *Mackey v. Lanier*, 486 U.S. 825, 108 S.Ct. 2182 (1988).

(3) Whether the Fifth Circuit has correctly applied ERISA preemption standards previously set forth by this Court.

PARTY LIST AND CORPORATE PARENTS

The names of all parties in the proceeding below appear in the caption of this case, fulfilling United States Supreme Court Rule 14(b).

Iron Workers Mid-South Pension Fund, Plaintiff-Appellant

Louisiana Laborers Health & Welfare Fund, Plaintiff-Appellant

Laborers National Pension Fund, Plaintiff-Appellant

Iron Workers Welfare Fund, Plaintiff

Iron Workers Local 623 Educational & Training Program Trust Fund, Plaintiff

Louisiana Laborers Local 1177 Apprenticeship Fund, Plaintiff

Construction & General Laborers Local 1177, Plaintiff

Millwrights Local 720 Pension Fund, Plaintiff

Millwrights Local 720 Apprenticeship Fund, Plaintiff

Millwrights & Machine Erectors Local Union 720, Plaintiff

IUOE Local 406, Plaintiff

I.B.P.A.T. Local Union No. 728 Health & Welfare Fund, Plaintiff

I.B.P.A.T. Local Union No 728 Apprenticeship Training Fund, Plaintiff

Terotechnology Corporation, Defendant

Borden Chemical, a Division of Borden, Inc.,
Defendant-Appellee

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John F. McDermott, Counsel for Defendant-Appellee

Taylor, Porter, Brooks & Phillips, Counsel for Defendant-Appellee

Marie Healey, Counsel for Plaintiffs-Appellants and Plaintiffs

Gardner, Robein & Urann (formerly Gardner, Robein & Healey) (Former law firm of counsel for Plaintiff-Appellant)

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OPINIONS BELOW

The decision of the Fifth Circuit Court of Appeals affirming the district court decision preempting the Louisiana Private Works Act under ERISA is reported at 891 F.2d 548 (5th Cir. 1990), and appears as Appendix B to the Petition for Writ of Certiorari. The district court's opinion is reported at 700 F.Supp 310 (M.D. La. 1988), and appears as Appendix C to the said Petition.

JURISDICTION

The Court of Appeals entered its judgment in this case on January 5, 1990. The Court of Appeals denied a timely petition for rehearing with suggestion for rehearing en banc on February 7, 1990. (Appendix A to the Petition for Writ of Certiorari)

This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 514(a) of ERISA, 29 U.S.C. §1144(a) (1982), provides in pertinent part:

> The provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

The Louisiana Private Works Act, in La. R.S. 9:4803 (A), provides in pertinent part that its statutory privileges and claims secure payment of:

> Amounts owed under collective bargaining agreements with respect to a laborer's or employee's wages or other compensation for which a claim or privilege is granted and which are payable to other persons for vacation, health and welfare, pension, apprenticeship and training, supplemental unemployment benefits, and other fringe benefits considered as wages by the Secretary of Labor of the United States in determining prevailing wage rates, unless the immovable upon which the work is performed is designed or intended to be occupied primarily as a residence by four families or less. Trustees, trust funds or other persons to whom the employer is to make such payments may assert and enforce claims for the amounts in the same manner and subject to the same procedures pro-

vided for other amounts due laborers and employees granted a claim or privilege under this part.

SUMMARY OF ARGUMENT

Respondent, Borden Chemical, a Division of Borden, Inc. (hereinafter "Borden"), respectfully suggests to this Honorable Court that the petition for writ of certiorari should be denied. The Fifth Circuit's decision is correct. La. R.S. 9:4803(A) provides an independent cause of action to ERISA employee benefit plans and their Trustees for the collection of delinquent contributions owed by a contractor. This state statute, which makes express reference to ERISA employee benefit plans and provides a remedy to employee benefit plans which is not provided under ERISA, clearly "relates to" employee benefit plans. Accordingly, under this Court's precedent and as the Fifth Circuit held, La. R.S. 9:4803(A) is preempted by ERISA. No writ of certiorari should issue in this matter.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. THE FIFTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY APPLICABLE DECISION OF THIS COURT

Petitioners have suggested that the Fifth Circuit's decision in this matter conflicts with *Mackey v. Lanier,* 486 U.S. 825, 108 S. Ct. 2181, 100 L.ED. 2d 836 (1987). Petitioners' position is patently erroneous. In *Mackey* this Court reaffirmed its prior holdings in *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 103 S. CT. 2890, 77 L.Ed. 2d 490 (1983), *Pilot Life Insurance Company v. Dedeaux,* 481 U.S. 41, 107 S. Ct. 1549, 95 L.Ed. 2d 39 (1987) and *Metropolitan Life Insurance Company v. Massachusetts,* 471 U.S. 724, 105 S.Ct. 2380, 85 L.Ed 2d 728 (1985) that state laws (such as La. R.S. 9:4803(A)) which are specifically designed to

affect employee benefit plans are preempted under §514(a), 29 U.S.C. §1144(a). In *Mackey*, this Court held that one of the two Georgia statutes under scrutiny, the one which made express reference to ERISA employee benefit plans, was preempted. As this Court held, *Mackey*, "[t]he state statute's express reference to ERISA plans suffices to bring it within the federal law's preemptive reach."

The Georgia statute which was held not to be preempted in *Mackey* is clearly distinguishable from La. R.S. 9:4803(A) on two grounds: first, that it made no reference to ERISA employee benefit plans; and, second, that it did not, as La. R.S. 9:4803(A) does, provide an independent cause of action to ERISA plans, trustees, beneficiaries or participants for the collection of unpaid contributions, but merely provided a means to enforce a judgment obtained *against ERISA plans* under Section 502, 29 U.S.C. § 1132, or state law. La. R.S. 9:4803(A) is more properly analogous to the Georgia statute held by this Court in *Mackey* to be preempted by Section 514(a) of ERISA.

Petitioners contend that they are permitted, under *Mackey*, to use state law procedures to garnish funds owed to Terotechnology Corporation by Borden in execution of the judgment rendered against Terotechnology for delinquent contributions. Respondent does not dispute this contention. However, petitioners do not stop there. Instead, petitioners argue that because of this, there is no reason that they shouldn't be able to collect funds directly out of Borden's pocket (not funds owed to Terotechnology by Borden) under La. R.S. 9:4803(A). Despite petitioners' argument to the contrary, this is a case of apples and oranges, just as was the case of the two Georgia statutes under scrutiny in *Mackey*.

Petitioners cite the cases of *Plumbers Local 458 Holiday Vacation Fund v. Appleton Paper, Inc.*, 10 EBC 1806 (Wis. Cir. Ct. 1988), affirmed 11 EBC 1257 (Wis. Ct. App. 1989) and *Carpenters Health & Welfare Trust Fund v. Parnas Corp.*, 176 Cal. App. 3d 1196, 222 Cal. Rpt. 668, 7 EBC 1031 (1986) as cases (which petitioners contend) correctly applied the *Mackey* decision to factual circumstances involving state construction lien statutes. In *Appleton*, petitioners have noted the Court's holding that the Wisconsin lien law is a "general statute *without any specific reference to ERISA obligations* . . . " (Petition for Writ of Certiorari, page 11) (Emphasis supplied.) This admission by petitioners effectively distinguishes *Appleton* and the statutes at issue therein from La. R.S. 9:4803(A). In describing the statutes, the Wisconsin Court stated:

> The statutes contain no reference to employee welfare plans or funds, but instead are laws with general application.

The Wisconsin Court went on to distinguish the statutes at issue and its holding from that of the California Court of Appeal in *Carpenters Southern California Administrative Corporation v. El Capitan Development Co.*, 197 Cal. App. 3d 790, 243 Cal. Rpt. 132 (Cal. 1988), in which the Court held California's mechanic's lien law was preempted by ERISA, as follows:

> In contrast (to the California statute), a perusal of Wisconsin statutes 779.03, 779.035 and 779.036 shows no reference to employee benefit plans whatsoever. These statutes are designed to provide a lien on funds due a general contractor or subcontractor to persons who provide labor or materials in improvement work and are not paid. The only reason an employee benefit plan is

> involved with this statute at all is the fact that the employees' lien was assigned to an employee benefit plan and these plans then step into the shoes of the employees to attempt to enforce the employees' lien. Nothing could relate in a more tenuous, remote or peripheral manner to an employee benefit plan.
>
> In addition, the Wisconsin law does not create rights in real estate like the California law but attaches to funds due a prime contractor or subcontractor. It is remedial and gives the Funds a secondary course of action to recover the payments Augie's was obligated to provide.

For these reasons, *Appleton,* a Wisconsin state court decision, is distinguishable and inapplicable. The Wisconsin lien statute did no more than allow (like the general garnishment statute in *Mackey)* the attachment of funds *owed to the signatory contractor which was obligated to make contributions to an ERISA plan.* It did not, as does La. R.S. 9:4803(A), create or provide a cause of action to an ERISA plan to recover delinquent contributions directly from a nonsignatory property owner. In *Parnas*, a decision which predates both *Pilot Life* and *Mackey*, the California Court applied an inappropriate test in order to reach the conclusion that the lien statute at issue was not preempted. This holding is placed into question, if not overruled, by *El Capitan,* a subsequent California appellate decision, and cannot stand under *Mackey* and this Court's holding that state statutes which "relate to " employee benefit plans are preempted by ERISA.

The Fifth Circuit's decision herein, which held La. R.S. 9:4803(A) to be preempted as a state statute making express reference and providing an independent cause of action to ERISA employee benefit plans and Trustees of

said plans, is correct and does not conflict with this Court's decision in *Mackey, supra*, or any other applicable decision of this Court.

II. THE FIFTH CIRCUIT'S DECISION IS IN ACCORD WITH THE DECISIONS OF THIS COURT AND RESULTED FROM THE APPLICATION OF THE CORRECT STANDARD FOR ERISA PREEMPTION

Petitioners contend that the Fifth Circuit's decision illustrates conflicts and confusion among the Circuit Courts as to the standard for ERISA preemption in general. Several of the cases which are cited by petitioners and which applied the two-prong test derived from this Court's decision in *Alessi v. Raybestos-Manhatten, Inc.*, 451 U.S. 504, 101 S.Ct. 1895, 68 L.Ed. 2d. 402 (1981) predate this Court's later decisions in *Mackey* and *Pilot Life*. If there is confusion or conflict among the circuits as to the applicable standard to be utilized in determinations of whether ERISA preempts state statutes, respondent questions whether this case would be the proper vehicle for its resolution. The Fifth Circuit in its decision has applied the proper "relates to" standard enunciated and applied by this Court in *Mackey, Shaw, Pilot Life, Metropolitan Life Ins. Co. v. Massachusetts* and *Massachussetts v. Morash*, 490 U.S. ____ 109 S.Ct. ____ 104 L.Ed. 2d 98 (1989). La. R.S. 9:4803(A) makes express reference to ERISA employee benefit plans and provides a cause-of-action against non-signatory property owners for the collection of unpaid contributions in circumvention of remedies provided under ERISA. It therefore clearly relates to employee benefit plans and is preempted pursuant to § 514(a) of ERISA.

Petitioners argue that the risk of loss as a result of the insolvency of a signatory contractor should fall upon the property owner, who should make up the delinquent contributions, rather than upon the laborer. This is not where Congress in enacting ERISA chose to place the responsibility for contributions to employee benefit plans.

Petitioners incorrectly, and without one scintilla of evidence in the record, allege that Borden could have protected itself from the consequences of La. R.S. 9:4803(A) by bonding this job but failed to do so. This was not possible, in law or fact, in that the work being performed by Terotechnology was not construction work, but was instead ongoing maintenance work of indefinite duration at the facility.

Petitioners do not come before this Court with "clean hands." As a result of petitioner's inadvertence, neglect or acquiescence, Terotechnology, the party obligated to make the contributions to the ERISA plans, was allowed to fall six months behind without Borden's knowledge. What petitioners really want in this case and future cases is an "out." If La. R.S. 9:4803(A) is held to not be preempted by Section 514(a) this action against a property owner would effectively encourage such "neglect" on the part of the plans and their administrators by giving them an additional source (not obligated or responsible for the contributions under ERISA) from which to recoup the shortage which they allowed to occur. Borden has already paid Terotechnology. Petitioners seek to have Borden pay twice as a consequence of what was, at a minimum, petitioners' own lack of diligence. The Fifth Circuit's decision that ERISA preempts La. R.S. 9:4803(A) places responsibility for unpaid contributions where Congress and ERISA's statutory language intended and provided.

CONCLUSION

The Fifth Circuit's decision that La. R.S. 9:4803(A) is preempted by ERISA §514(a) is correct and was reached by its application of the proper standard which has been repeatedly utilized by this Court in determining whether a state statute is preempted by ERISA. For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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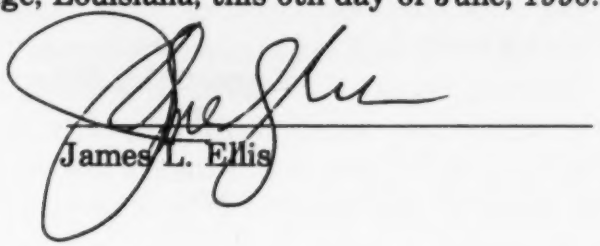
CERTIFICATE

I hereby certify that a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari has this day been mailed postage prepaid, to Ms. Marie Healey, Attorney at Law, 336 Lafayette Street, Suite 200, New Orleans, Louisiana, 70130.

Baton Rouge, Louisiana, this 6th day of June, 1990.



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